157-370

157-370

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 789.

ROBERT S. STEVENS, - - Plaintiff in Error.

vs.

WILLIAM NICHOLS, - - - Defendant in Error.

ERROR TO SUPREME COURT OF MISSOURI.

AGREED STATEMENT AND STIPULATION CONCERNING SAME.

The J. West Goodwin Publishing Company, Sedalia, Mo.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

NO. 789.

JAMES A. CARR, Adm'r of
ROBERT S. STEVENS, - - Plaintiff in Error.

vs.

WILLIAM NICHOLS, - - - Defendant in Error.

AGREED STATEMENT.

To avoid the necessity of printing the entire record, and to save the court the unnecessary labor and annoyance of reading many pages of immaterial matter, counsel for both parties have selected and set forth all that is necessary to the

determination of the motion to dismiss or affirm, and by stipulation hereto attached have agreed that in lieu of the entire record, the motion shall be heard and determined upon the following

STATEMENT.

In January, 1881, the plaintiff commenced a proceeding in the Pettis Circuit Court to procure the issuing of executions against R. S. Stevens and one H. D. Mirick, as stockholders in the Texas and Atlantic Refrigerator Car Company, against which plaintiff had previously recovered judgment.

The section of the Missouri statute upon which this proceeding was based was Section 736, Revised Statutes of 1879 (now Section 2517, R. S. 1889), and reads as follows:

"If any execution shall have been issued against any corporation, and there cannot be found any property or effects whereon to levy the same, then such execution may be issued against any of the stockholders to the extent of the amount of the unpaid balance of such stock by him or her owned; provided, always, that no execution shall issue against any stockholder except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the persons sought to be charged; and upon such motion such court may order execution to issue accordingly; and provided further that no stockholder shall be individually liable in any amount over and above the amount of stock owned."

The original pleading, filed in January, 1881, averred the necessary facts under the statute of Missouri and was the same in substance and effect as the amended motion on which the trial was had.

Summons was issued to the Sheriff of Pettis County on February 2, 1881, and returned April 16, 1881, *non est* as to defendants Stevens and Mirick.

An alias summons issued May 14, 1881, and was served on Stevens on August 20, 1881, and returned *non est* as to Mirick.

On September 13, 1881, it being the third day of the September Term, Stevens appeared and by consent obtained leave to file his answer in sixty days after that term of court.

On January 3, 1882, being the first day of the January Term, Stevens filed a demurrer, and on February 1, 1882, being the 26th day of the January Term, by consent he withdrew his demurrer, and again obtained leave to file answer in sixty days after that term, and on the same day Mirick entered his voluntary appearance, and obtained leave, by consent, to answer sixty days after that term, and on April 21, 1882, in vacation, Stevens and Mirick jointly filed an answer, which was a general denial.

Afterwards on May 4, 1882, it being the

fourth day of the May term, Stevens and Mirick jointly filed a petition to remove the case to the United States Court, and on May 8, being the seventh day of the May term, they filed bond for such removal.

On such petition of Stevens and Mirick jointly, the case was sent to the U. S. Court for the proper district. In that court the defendants filed a joint amended answer, as follows:

The defendants, Robert S. Stevens and Henry D. Mirick, for their separate and amended answer to the plaintiff's petition filed in the above entitled cause, deny each and every allegation in said petition.

Defendants, for another and further defence to the cause of action alleged in said petition, state that the pretended judgment described therein was recovered on the promissory notes executed by the Texas and Atlantic Refrigerator Car Company, by its president, J. R. Barrett, to himself as payee, and endorsed in blank by him, as alleged by the plaintiff in his suit against said Texas and Atlantic Refrigerator Car Company in the circuit court of Pettis county, Missouri; that said notes were not paid by said company at their maturity; that prior to the institution of said suit and after the maturity of said notes as aforesaid, to-wit, on the 25th day of November, A. D 1875, said J. R. Barrett, the payee and endorser on said notes, paid off and fully satisfied said notes to the Commercial Bank of St. Louis, the owner and holder thereof at the time of said payment and satisfaction; that plaintiff, at the time of the commencement of said suit, had no title, right, interest or claim in or to said notes or either of them, and he had none at

the time of the rendition of said judgment, and he has no title, right, interest or claim in or to said judgment now; that he instituted and prosecuted said suit in his own name and prosecuted it to final judgment for the exclusive use and benefit of said J. R. Barrett, in pursuance of an illegal and corrupt agreement between plaintiff and said Barrett; that said Barrett is the real party in interest; that said suit was so instituted and prosecuted to final judgment in the name of plaintiff, with the intent and for the purpose of unjustly, improperly and illlegally coercing money by this proceeding out of these defendants, as stockholders in said Texas and Atlantic Refrigerator Car Company, when they did not owe any money to said company, and with the intent and for the purpose of preventing these defendants, as stockholders in said company as aforesaid, from setting up certain equitable defenses and equities existing between said J. R. Barrett, as president of said Texas and Atlantic Refrigerator Car Company and these defendants, as stockholders therein and which equities, if set up in a direct suit between said Barrett and these defendants, would be a full and complete bar to any suit which said Barrett could institute against these defendants for or on account of the payment of said notes by said Barrett to said Commercial Bank of St. Louis as aforesaid.

3. For a further defence to said pretended judgment defendants state that plaintiff obtained and procured it by fraud. Defendants set up and plead the foregoing facts as a full and complete bar to plaintiff's cause of action.

The plaintiff filed a reply putting in issue the new matter in the answer, and a trial was had before a jury, on the demand of the defendants, which resulted in separate verdicts and judg-

ments against the respective defendants, as follows:

Verdict.

We, the jury, find for the plaintiff as against Henry D. Mirick in the sum of $627.41, and also in favor of plaintiff as against R. S. Stevens in the sum of $5,027.33.

L. McCUBBIN, *Foreman.*

Judgment.

This day comes the plaintiff, by his attorney, Geo. P. B Jackson, Esq., and it appearing that as to the defendant, the Texas and Atlantic Refrigerator Car Company, this cause is not movable to this court from the circuit court of Pettis county, Mo., it is ordered by the court that this cause be dismissed as to said defendant, The Texas & Atlantic Refrigerator Car Co., and that plaintiff take nothing against said defendant; and now comes the plaintiff, and, by leave of the court, *remits* the sum of thirty dollars from the amount returned by the jury in their verdict against the defendant, Robert S. Stevens. It is therefore adjudged by the court that the plaintiff have and recover of the defendant, Robert S. Stevens, the sum of four thousand nine hundred and ninety-seven and $\frac{33}{100}$ dollars ($4,997.33), together with two-thirds of the costs incurred in this proceeding, which, by consent of the parties hereto, are taxed against said defendant; and it is further ordered that execution issue against said defendant Stevens for said judgment and costs; and it is therefore further adjudged that the plaintiff recover of the defendant, Henry D. Mirick, the said sum of six hundred and twenty-seven and $\frac{41}{100}$ dollars ($627.41), together with one-third of the costs incurred in this proceeding, which, by consent of the parties, are taxed against said defend-

ant; and it is further ordered that execution issue against said defendant Mirick for said judgment and costs.

Stevens brought his branch of the case to this court by writ of error, and while the same was pending Mirick filed a petition in the U. S. Circuit Court for injunction to restrain the issuing of an execution against him.

Before the same was acted on this court reversed the judgment in the Stevens case, and remanded the case to the U. S. Circuit Court with directions to remand the case to the Pettis Circuit Court, for the reason that it had not been properly removed from the State Court, and the Federal courts had never acquired jurisdiction. (Stevens vs. Nichols, 130 U. S. 230.)

Thereupon a stipulation was filed, and orders were made in the U. S. Circuit Court for the return of the cases to the Pettis Circuit Court.

The stipulation and orders of the U. S. Circuit Court are as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE CENTRAL DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

NOVEMBER TERM, 1889.

WILLIAM NICHOLS, - - - - - - - Plaintiff

vs.

ROBERT S. STEVENS, AND HENRY D. MIRICK, - - - - - Defendants

AND

HENRY D. MIRICK, - - - - - - - Plaintiff

vs. Injunction,

WILLIAM NICHOLS, - - - - - Defendant.

It is hereby stipulated and agreed by and between the above named plaintiffs and defendants herein acting by and through their respective attorneys, as follows:

Whereas the Supreme court of the United States on the writ of error of said Robert S. Stevens from the judgment rendered against him in favor of the said William Nichols, has decided that the United States Circuit court for the Central Division of the Western District of Missouri did not acquire or have jurisdiction in said cause, by the proceedings for the removal of the same from the Circuit court of Pettis county, Missouri, and has reversed the said judgment with directions to the said Circuit court to remand the said cause to the said Circuit court of Pettis county, Missouri, and adjudged that the said Robert S. Stevens pay all the costs incurred in the said cause in both the said Supreme and Circuit courts of the United States; for the reason that neither the petition of Robert S. Stevens and Henry D. Mirick for the removal of said cause from the Circuit court of Pettis county, Missouri, to the Circuit court of the United States for the Central Division of the Western District of Missouri, nor any other part of the record in said cause show that said Stevens and Mirick or either of them were citizens of a state other than the one of which the plaintiff Wm. Nichols, was a citizen at the commencement of said suit in the Circuit court of Pettis county, Mo.

And, whereas, the said Henry D. Mirick has heretofore filed a bill for an injunction restraining the collection or enforcement of the judgment rendered against him in favor of said William Nichols by the said United States Circuit court, which said bill is now standing upon a demurrer thereto filed by the defendant, William Nichols, therein. Therefore it is agreed that the said bill for injunction shall be dismissed by the com-

plainant therein, said Henry D. Mirick, at his costs, and the defendant, William Nichols, waives all right of action upon any bond that may have been filed in said injunction suit and the judgment heretofore rendered in favor of said William Nichols against Henry D. Mirick, shall abide the decision of the Supreme court reversing the judgment in favor of William Nichols, against Robert S. Stevens and the United States Circuit court for the Central Division of the Western District of Missouri shall, with the consent of all parties, set aside, cancel and annul the said judgment in favor of William Nichols against Henry D. Mirick, without any objection or exception being made or taken by either party to the time, manner or circumstances at, by or under which the same is done; and it is further agreed that the said Henry D. Mirick shall pay all costs in said cause incurred by reason of the removal of said cause to the said United States Circuit court, and all costs which have accrued in said court, including the costs pertaining to the remanding and return of said cause to the said Circuit court of Pettis county, Missouri, and the said United States Circuit court is hereby authorized to enter judgments against said Robert S. Stevens and Henry D. Mirick, respectively, for all said costs up to and including the return of said causes to the said Pettis Circuit court.

And it is further agreed that the said case of William Nichols against Henry D. Mirick and all papers, pleadings, etc., pertaining thereto shall be remanded and returned to the Circuit Court of Pettis county, Missouri, except the original transcript, at the same time that the papers, pleadings, etc., in the case of William Nichols against Robert S. Stevens are remanded to the Circuit Court of Pettis county.

And it is further agreed that, if said United States Circuit

court will consent thereto, all original papers, pleadings, depositions, etc., now on file in said cause entitled William Nichols against Robert S. Stevens and Henry D. Mirick, No. 1837, shall be remanded and forwarded to the clerk of the Circuit court of Pettis county, Missouri; and that wherever any of such original papers shall be so remanded and forwarded no copies of the same shall be made.

It is further agreed that upon any future trial in said cause or causes against both or either of said defendants, upon the pleadings as they now exist, or upon any pleadings that may be filed against said defendants, or either of them, the said depositions or any of them, may be read without any objections thereto on account of the time or manner of taking the same, or on account of their having been transmitted from said United States Circuit court, and the said cause against said defendants or either of them may be tried upon said depositions, so far as applicable, subject to any legal objections, however, for competency or relevancy, provided, however, that nothing herein contained shall be construed to prevent either party from taking and introducing such other or further testimony as they may desire from the witnesses whose depositions are now on file or from any other witnesses or from introducing any other competent evidence, that they or either of them may see proper to offer; and provided further that if the said United States Circuit court shall not consent to the transmission of the original depositions from that court to the Circuit court of Pettis county, Missouri, then either party may file in said Pettis Circuit court a copy of the printed record as prepared and used in the Supreme court of the United States in said cause of Robert S. Stevens, plaintiff in error, against William Nichols, and the said printed record of the testimony of the witnesses heretofore ex-

amined on the trial of said case in this court may be used in lieu of the said depositions, now on file in this court, and with the same effect and privileges as hereinbefore stipulated for in regard to said depositions.

And it is further expressly agreed and understood that said Stevens and Mirick or either of them, do not by signing this stipulation waive any right to renew their application in such manner as they or either of them may deem proper for a removal of said cause or causes from said Circuit court of Pettis county, Missouri, to the Circuit court of the United States for the Central Division of the Western District of Missouri, after said cause or causes shall have been remanded to said Circuit court of said Pettis county, Mo.

This stipulation shall be executed in duplicate and one copy filed in the United States Circuit court aforesaid, and the other shall be filed in the Circuit court of Pettis county, Missouri.

In witness whereof the parties hereto by their respective attorneys have hereunto and unto a duplicate copy hereof, set their hands this 19th day of November, 1889.

JACKSON & MONTGOMERY,
Attorneys for Wm. Nichols.

JAMES CARR,
Attorney for R. S. Stevens and Henry D. Mirick.

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION.

November Term, 1889.

WEDNESDAY, November 20th, 1889.

Present:

HON. JOHN F. PHILIPS, *Judge.*

WILLIAM NICHOLS

vs.

TEXAS AND ATLANTIC REFRIGERATOR CAR COMPANY, ROBERT S. STEVENS AND H. D. MIRICK.

Now on this day come the parties hereto by their respective attorneys, and the defendant files herein the mandate of the Supreme Court of the United States in the cause which was taken by writ of error by said defendant, to the Supreme Court of the United States by which mandate it appears to the satisfaction of the court that the judgment of the court was by the said Supreme Court reversed on said writ of error for the reason that neither the petition of R. S. Stevens and H. D. Mirick, for the removal of the cause from the Circuit Court of Pettis county, Mo., to this court or any other part of the record in said cause showed that the defendant Stevens was a citizen of a state other than the one of which the plaintiff was a citizen at the commencement of said suit in the Circuit Court of Pettis county, and it was ordered by said Supreme Court that the defendant pay the cost herein, and with the further direction that the cause be remanded to the Circuit Court of Pettis county, Mo., and the parties hereto now file a stipulation herein.

It is therefore ordered that in accordance with said stipulation the clerk of this court transmit to the clerk of the Circuit Court of said Pettis county, Mo., all pleadings, depositions and papers pertaining to the cause now on file therein, except the original transcript and mandate of the Supreme Court of the United States without making any copy of the same.

It is further ordered that defendant R. S. Stevens pay the costs as directed by the said Supreme Court of the United States and that execution issue therefor.

A similar judgment was entered as to H. D. Mirick.

Thereafter on May 23, 1890, the said stipulation and orders and the original papers, etc., therein

referred to were filed in the Pettis Circuit Court.

Afterwards, on the same day on which the above stipulation and order were filed and the cause re-docketed in the Circuit Court of Pettis county, Mo., to-wit: On May 23, 1890, Henry D. Mirick, and appellant, Robert S. Stevens, filed a motion, duly verified by affidavit of said Stevens, for leave to amend the petition filed in said Circuit Court of Pettis county on the 4th day of May, 1882, for the removal of said cause to the Eastern, now Central Division of the Circuit Court of the United States for the Western District of Missouri by interlining in said petition now for then the following words, viz:

Between the words "cause" and "is" where they occur in the first paragraph of said petition, the words "was at the commencement of said cause," and between the words "defendants" and "are," where said words occur in said first paragraph of said petition, the words "were at the commencement of said cause and are now citizens of a state different from the plaintiff—that is to say, the defendant Robert S. Stevens was, at the commencement of said cause, and still is, a citizen of the State of New York, and the defendant, Henry D. Mirick, was, at the commencement of said cause, and he was at the time of filing said petition and also at the time of this court's making said order for the removal of this cause, as aforesaid, a citizen of the State of Ohio, and is now a resident of the City of Washington in the District of Columbia," so that with said words interlined and inserted in the first paragraph of said original petition, it

will read as follows, viz: "Your petitioners, the above named defendants, Robert S. Stevens and Henry D. Mirick, state that the plaintiff in the above entitled cause, was at the commencement of said cause, and is, a citizen of the State of Missouri, and your petitioners, the said defendants, were at the commencement of said cause, and they are now, citizens of a state different from the plaintiff—that is to say, the defendant Robert S. Stevens was, at the commencement of said cause, and he still is, a citizen of the State of New York, and the defendant Henry D. Mirick was, at the commencement of said cause, and he was at the time of filing said petition, and also at the time of this court's making said order for the removal of this cause, as aforesaid, a citizen of the State of Ohio, and he is now, a resident of the City of Washington in the District of Columbia." And when said words have been interlined and inserted therein, then that the court will make an order that said cause shall be removed to the Circuit Court of the United States for the Central Division (it being at the time the original order of removal was made herein, the Eastern Division) of the Western District of Missouri, now for then for the following reasons, viz:

First. Because said Robert S. Stevens and Henry D. Mirick, on the 4th day of May, 1882, filed said petition for a removal of said cause from this court to the Circuit Court of the United States for the Eastern Division of the Western District of Missouri on the ground that the plaintiff was at the commencement of said suit, a citizen of the State of Missouri, and he continued to be a citizen of the State of Missouri until the time when said petition was filed, and he still is a citizen of the State of Missouri, and the defendant, Robert S. Stevens, was at the commencement of said suit a citizen of the State of New York, and he continued from said time until the time

when said petition was filed, and he still is, a citizen of the State of New York, and the defendant Henry D. Mirick, was at the commencement of said suit a citizen of the State of Ohio, and he continued from said time until the time when said petition was filed and also at the time of this court's making said order for the removal of said cause as aforesaid, a citizen of the State of Ohio, and that by accident their attorney, W. W. S. Snoddy, omitted to put in said petition the words hereinbefore stated, when he was drawing it, although he was informed by defendants that they were respectively citizens of the State of New York and Ohio as herein stated, and he could have truthfully inserted said words in said petition, and he fully intended to insert them therein, and the omission of said words in said petition was not discovered until after the order for the removal of said cause had been made and said cause had been removed into said Circuit Court of the United States, and for want of said words said petition as filed failed to show the diverse citizenship of the plaintiff and the defendants at the commencement of said cause necessary to be shown in order to confer jurisdiction on said Circuit Court of the United States for the Eastern Division of the Western District of Missouri.

Second. Because said petition for the removal of said cause from this court to the Circuit Court of the United States for the Eastern Division of the Western District of Missouri was, and is in other respects, drawn in conformity with the Act of Congress in such cases made and provided to entitle your petitioners to a removal of said cause, but by accident said words were left out when said petition was drawn by defendant's attorney, and for want of said words said petition fails to show the diverse citizenship of the plaintiff and defendants at the commencement of said suit, although said diverse citizenship existed

at said time as well as at the time of filing said petition, and also at the time of this court's making said order for the removal of this cause as aforesaid, and said petition for the want of said words therein, fails to show that the said Circuit Court of the United States had or has jurisdiction of said cause, and if said words be not inserted in said petition, said defendants will lose their right to have said cause heard and tried in the Circuit Court of the United States as they were at the time of filing said petition and still are entitled to.

The original petition had been filed on the 4th day of May, 1882—or more than eight years before, the offer to amend and prior to the amendment of the removal act in 1887.

The amendment proposed was the insertion of the matter the absence of which this court had held rendered the original petition defective and had prevented the United States Court acquiring jurisdiction. The State Court refused to permit the amendment or to again transfer the case to the Federal Court, and to this action the defendants Stevens and Mirick excepted.

Thereupon the plaintiff Nichols, (defendant in error here,) filed amended motions for execution, separating the proceeding against Stevens from that against Mirick. The defendant Stevens objected, but did not save any exception to the filing of the amended motion. Thereafter the case proceeded against the defendant Stevens indepen-

Office Supreme Court U. S.

dently of Mirick. In August following, Stevens filed an answer to the amended motion, presenting the same issues as presented in the answer set forth at page——ante, and on which the first trial was had in the United States court, to which a replication was filed. A trial was had at the January 1891, term of the State Circuit Court, both parties appearing and introducing evidence. No defense was made which involved any federal question. Nichols again recovered judgment, as he had formerly done in the Federal Court. In due time Stevens filed motions for new trial and in arrest of judgment.

In order that there may be no uncertainty that no federal question was then presented we set forth these motions, except the captions and signatures, as follows:

"Now on this day comes the defendant Stevens and moves the court to set aside the finding of facts by the court rendered in the above entitled cause and the judgment entered on said finding of facts against him, and grant a new trial therein for the following reasons, viz:

First—Because the court on the trial of said cause admitted illegal, irrelevent and improper evidence on the part of the plaintiff.

Second—Because the court erred in not sustaining this defendant's demurrer to plaintiff's evidence when the plaintiff closed his case.

Third—Because the court found said finding of facts contrary to evidence.

Fourth—Because the court found said finding of facts without evidence.

Fifth—Because the court erred in its declaration of law made at the request of the plaintiff.

Sixth—Because the court erred in not making the declarations of law.

Seventh—Because the court erred in not granting each request to make a declaration of law as made by defendant.

Eighth—Because the court erred in finding for the plaintiff when it should have found for the defendant.

Afterwards on the same day the defendant, Stevens, filed a motion in arrest of judgment in words, following, viz:

"Now on this day comes the defendant, Robert S. Stevens, and moves the court to arrest the judgment in the above entitled cause for the following reasons, viz:

First—Because the facts alleged in the plaintiff's petition do not constitute any cause of action against said defendant Stevens.

Second—Because there is no privity of contract between the plaintiff, as a judgment creditor of the Texas & Atlantic Refrigerator Car company, and the defendant Stevens, as a stockholder therein, and the plaintiff, as such judgment creditor, cannot maintain this action at law on his judgment, against the said Texas & Atlantic Refrigerator Car Company, to recover against said defendant Stevens the balance remaining upon his subscription to the capital stock of said company.

Third—Because this court in an action at law has no juris-

diction over the subject matter of said action to render a judgment therein for the plaintiff and against said defendant Stevens for the amount found by the finding of facts of the court, or for any amount at all.

Fourth—Because this court, sitting only as a court of equity, has no jurisdiction to render a judgment for the plaintiff on the judgment described in his petition without suing as well for himself as for all other creditors of the Texas & Atlantic Refrigerator Car company, and making all stockholders in said company who have not fully paid up their stock therein, parties defendant to such suit.

Fifth—Because all the necessary parties, defendant, are not before this court to authorize it to render judgment for the plaintiff, on the judgment described in his petition."

These motions being overruled Stevens appealed to the Supreme Court of Missouri. That court is composed of two divisions, which sit and hear and decide cases separately. For various reasons cases may be transferred to the court in *banc*. One of these reasons is that a case involves a federal question, for which the case may be sent to the court in *banc*, either before hearing by the order of the division in which it is pending, or after a decision, on the motion of the losing party. Pending the appeal Stevens died and the case was revived in the name of his administrator, the plaintiff in error.

This case was assigned to Division No. 2, of the State Supreme court, where an assignment of

errors was filed—assigning ten grounds of error for review, only one of them in any manner referring to any subject which could at all be considered as relating to a federal question, and that was as follows:

"First. The refusal to permit defendants to amend their petition for removal of the cause to the U. S. Circuit court.

The plaintiff in error here, appellant there, filed a printed brief in the case. We quote at length everything that was presented for the consideration of the court, which can by any possibility refer to any supposed federal question as follows:

"The petition for the removal of the cause to the United States Circuit court, filed May 4th, 1882, was held to be defective because it did not state the diverse citizenship, at the date of the institution of the suit, of the parties to the record. On the return of the case to the State court the defendants applied at once for leave to supply this statement. When this application was made no action had yet been taken in the cause after its return to the State court. The correction, if allowed, would have related back to the time of the filing of the original petition for removal and thereupon the right of removal would have been perfected.

Freeman vs. Butler, 39 Federal Report 1.

Stevens vs. Nichols, 130 U. S. R., 230."

The judgment against Stevens was affirmed in Division No. 2 of the Supreme court of Missouri.

The whole of the opinion which relates to the supposed federal question is as follows:

"It is urged, in regard to the removal of the cause to the Federal court, that error occurred. Several authorities establish the proposition, when a cause has been removed to a Federal court, and has been remanded because the petition for removal does not set up the diverse citizenship of the parties at the commencement of the suit, etc., that then a second removal on the same ground is not allowable. Johnson vs Donvan, 30 Fed. 395; Railway Co. vs. McLean, 108 U. S 212, 2 Sup. Ct. 498, and cases cited. And even if this obstacle had not arisen in this case, one equally fatal is apparent of record, and that is that Stevens did not file his petition for removal until several terms of the Pettis Circuit court had elapsed. Wolf vs. Chisolm 30 Fed. 881; Austin vs Gagan, 39 Fed. 626; Dixon vs. Telegraph Co. 38 Fed. 377. And it has also been held by the Federal courts that an extension of time to the next term could not be granted, even by stipulation of parties. Car Co. vs. Speck, 113 U. S. 84, 5 Sup. Ct. 374. This was the ruling under the removal act of 1875, and that of 1887 is much more strict. Refusal of the trial court to permit defendant Stevens to amend his petition for removal was therefore proper."

The opinion is not yet published in the official reports but will be found in 25 S. W. Rep. 578.

Thereupon a motion for a rehearing in Division No. 2 was filed, and at the same time there was filed a motion to transfer the case to the court in *banc*, for the reason, as stated, as follows:

"Because a federal question is involved in said case, to-wit:

Appellant (plaintiff in error here) should have been given leave to amend his petition for the removal of said case to the United States Circuit court, and such amendment would have related back to the date of the original petition, and thereupon the right of removal would have been perfected."

Thereupon, as required by the constitutional amendment, making two divisions of the Missouri Supreme court, Division No. 2, sent the case to the court in *banc*. The appellant filed a printed brief and argument before the court in *banc* in which was repeated in *haec verba* the matter in the former brief relative to the proposed amendment of the petition for removal, quoted above, to which was added in the printed argument the following:

"The court will observe from the statement that of the many and troublesome questions heretofore presented in this cause, two only are urged at the present hearing. The points upon which the arguments in the cause heretofore made have been mainly, if not entirely, based, are not presented in the statement now filed.

Of the two questions now presented, one, the question raised by the refusal of the court below to permit an amendment of the removal affidavit, we desire to submit upon the authorities heretofore cited."

The court in *banc* again affirmed the judgment against Stevens.

The opinion of the court in *banc* is published in 27 S. W. Rep. 613, and is as follows:

"Per Curiam. The opinion delivered in Di-

vision No. 2 is adopted and approved in *banc.*"

Thereupon Stevens sued out a writ of error from this court and has brought the case here for review of the decisions of the state courts, on the theory that a federal question is involved.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

NO. 789.

JAMES A. CARR, Adm'r of
ROBERT S. STEVENS, - - Plaintiff in Error.

vs.

WILLIAM NICHOLS, - - - Defendant in Error.

STIPULATION.

Whereas, the record in this case is voluminous, and to print and submit the entire record would impose useless labor upon the court;

Therefore, it is stipulated and agreed by the parties, the Plaintiff in Error and the Defendant

Office Supreme Court U. S.

in Error, that the printing of the entire record is waived and the motion to dismiss the writ of error or to affirm the judgment, filed by the defendant in error, shall be submitted, heard and determined upon an agreed statement of facts, and they have selected from the record all that is essential to a proper determination of said motion and have arranged the same into an "Agreed Statement," as set forth in the preceding pages from 1 to 23 inclusive, and it is stipulated that the said motion shall be submitted and determined upon said "Agreed Statement" in lieu of the full record, with the same effect as though the entire record had been printed, and it is farther agreed that the cost of printing said statement, to-wit. The sum of $19.50, shall be taxed as costs in the case against the party who may be unsuccessful on said motion.

Attorneys for Plaintiff in Error.

Attorney for Defendant in Error.

157-370

157-370

Office Supreme Court U. S.
FILED.
MAR 12 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

JAMES A. CARR, Administrator of Robert S. Stevens, Deceased,
Plaintiff in Error,

vs.

WILLIAM NICHOLS,
Defendant in Error.

No. 789.

ERROR TO SUPREME COURT OF MISSOURI.

STATEMENT AND BRIEF OF PLANTIFF IN ERROR ON DEFENDANT'S MOTION TO DISMISS OR AFFIRM.

GEO. A. MADILL,
JOHN M. HOLMES, and
JAMES A. CARR,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

JAMES A. CARR, Administrator of Robert S. Stevens, Deceased,
Plaintiff in Error,

vs.

WILLIAM NICHOLS,
Defendant in Error.

No. 789.

ERROR TO SUPREME COURT OF MISSOURI.

STATEMENT.

This case originated in the Circuit Court of Pettis County, Missouri, in January, 1881. It was a suit on a judgment recovered against the Texas & Atlantic Refrigerator Car Co., a corporation, to enforce payment by defendants of the unpaid balance of an alleged subscription to the capital stock of said corporation. The summons, which is the statutory process of bringing a defendant into court, was served on de-

fendant Stevens, in time to require his appearance at the September Term of court, but defendant Mirick never was served. Stevens appeared at the proper time, and by consent obtained an order of court extending the time for pleading. The Missouri Code expressly authorizes such an extension of the time of pleading. (R. S. of Mo., 1889, Sec. 2062.) At the January Term, 1882, and within the extended time, Stevens filed a demurrer. Under the Missouri Code (R. S. of Mo., 1889, Sec. 2046), a demurrer is merely a means of testing and shaping the pleadings, as either party has the right, of course, upon the determination of the demurrer, to withdraw his demurrer, or amend his pleadings, as the case may be. By consent of parties, however, Stevens withdrew the demurrer during the January Term, 1882, without its ever having been heard or submitted to the court. Defendant Mirick voluntarily appeared on the day Stevens' demurrer was withdrawn, and the two defendants, by consent, obtained an order of court again extending the time of pleading. Within this extended time, and during the vacation preceding the May Term, 1882, the defendants filed their joint answer under the provision of the Missouri Code, requiring that "two or more defendants, making the same defense, shall answer jointly." (R. S. of Mo., 1889, Sec. 2051.) Early in the May Term, 1882, the defendants filed their joint petition for the removal of said cause to the proper United States Circuit Court, and also a bond therefor, and the case was thereupon ordered by the State Court to be transferred to the United States Circuit Court. The ground of removal was

diverse citizenship of parties, the plaintiff being a citizen of Missouri, while defendants were citizens of New York and Ohio, respectively.

The case was pending in the United States Circuit Court for several years, during which time plaintiff made no objection to the removal from the State Court, but filed pleadings and motions of various kinds, and went to trial on the merits. Thereafter, the case was carried by writ of error to the Supreme Court of the United States, where the case was fully argued and submitted on its merits, without any question of any kind being raised by the parties to the removal of the case from the State Court. The Supreme Court, however, of its own motion (Nichols v. Stevens, 130 U. S., p. 230), declared the petition for removal fatally defective in confining its allegation of diverse citizenship to the time of filing the petition for removal. The case was accordingly remanded to the Circuit Court with directions to remand to the State Court, which order was obeyed.

Before the mandate of the Supreme Court was filed in the Circuit Court, the parties signed and filed a stipulation relating to the remanding of said case (pp. 7-11 of Agreed Statement), and containing the following clause:

"And it is further expressly agreed and understood that said Stevens & Mirick, or either of them, do not by signing this stipulation waive any right to renew their application in such manner as they or either of them may deem proper for a removal of said cause or causes from said Circuit Court of Pettis County, Missouri, to the Circuit Court of the United States for the Central Division of the West-

ern District of Missouri, after said cause or causes shall have been remanded to said Circuit Court of said Pettis County, Missouri."

On the same day, May 23, 1890, on which the remanding order of the U. S. Circuit Court was filed in the State Court, and the cause redocketed therein, defendants, Stevens and Mirick, filed a motion, duly verified by affidavit of said Stevens, for leave to amend their original petition for removal *nunc pro tunc* by inserting in said petition the words, "was at the commencement of said cause," and other words to show that the necessary diversity of citizenship did exist *at the commencement of the proceeding*, and continued until the time of the motion, and asking for an order of removal now for then. This motion set out the facts that the matters sought to be inserted were true, that they were known to defendants' attorney at the time he drew the original petition for removal, and that he intended to insert them in said original petition, and only omitted them by accident, and that their omission was not discovered until after the order for removal to the United States Circuit Court was made and until after the case was removed. These facts were verified by affidavit.

In support of this verified motion, defendants read in evidence the original petition, affidavit and bond for removal. The State Court overruled this motion, and defendants saved an exception. Thereafter, a trial was had in the State Court, resulting in a judgment against defendant, Stevens, from which he appealed to the Supreme Court of Missouri, assigning as error the refusal of the lower court to permit the

amendment of the petition for removal and to remove said cause. Said Supreme Court, Division No. 2, having decided against defendant Stevens, he filed a motion to transfer the case to the State Supreme Court *in banc*, on the sole ground that a Federal question was involved. This motion was sustained, and upon a hearing by the State Supreme Court *in banc* the jurisdiction and judgment of the lower court were affirmed.

Thereupon the case was brought to this court by writ of error to the Supreme Court of Missouri.

POINTS AND AUTHORITIES.

I.

The question whether there is a proper case for removal on the face of the record is a Federal question.

Railroad Co. v. Koontz, 104 U. S. 5.
Oakley v. Goodnow, 118 U. S. 43.

II.

The only question for the State Court to decide is, whether, on the face of the record, the petitioner is entitled to a removal. When the record sets out a proper case for removal, the State Court cannot try any issue of fact thereon.

Carson v. Hyatt, 118 U. S. 279.
K. C., F. S. & M. R. R. Co. v. Daughtry, 138 U. S. 298.
Bur., Ced. Rap. & Nor. Ry. v. Dunn, 122 U. S. 513.

III.

The time of filing a petition for removal is not a jurisdictional fact. An objection that the petition was not filed in time is waived unless promptly raised.

Martin v. Baltimore & Ohio R. R. Co., 151 U. S. 673.
Ayers v. Watson, 113 U. S. 594.

The objection is waived on the same principle that the absence of an oath, the failure to sign the petition and incompetent sureties on the bond, are considered mere informalities which are waived unless promptly objected to.

Removal Cases, 100 U. S. 457.
Street Railroad Co. v. Hart, 114 U. S. 654.

IV.

A petition for removal under the law of 1875 is in time if filed promptly after the event which gives occasion for it, as, for instance;

(*a*) After the judgment of an appellate court remanding the case for a new trial, in a case pending in a State appellate court when the act of 1875 was passed.

King v. Worthington, 104 U. S. 44.
Hewitt v. Phelps, 105 U. S. 393.
Pettilon v. Noble, 7 Biss. 449.

(*b.*) After appearance of an "unknown owner;" or an intervenor; or an assignee in bankruptcy.

Harter v. Kernochan, 103 U. S. 562.
Wehl v. Wald, 17 Blatch. 342.
Burdick v. Peterson, 2 McCrary, 135.
Chicago v. Hutchinson, 15 Fed. Rep. 129.

(*c.*) Where the delay was accidental or was otherwise excusable.

Burgunder v. Browne, 59 Fed. Rep. 497.
Feibleman v. Edmonds, 69 Tex. 334.

V.

When the time for pleading is extended by order of court, the time for filing a petition for removal is likewise extended.

Maloy v. Duden, 25 Fed. Rep. 673.
Rycroft v. Green, 49 Fed. Rep. 177.
Peoples' Bank v. Ætna Ins. Co., 53 Fed. Rep. 161.
Wilcox & Gibbs Guano Co. v. Phœnix Ins. Co., 60 Fed. Rep. 929.

VI.

Jurisdictional facts may be inserted by amendment, but the amendment must be made in the court in which the suit originates.

(*a.*) The Federal Circuit Courts should allow amendments (1) in cases originating therein so as to show the diversity of citizenship necessary to their jurisdiction.

Morgan's Exr. v. Gay, 86 U. S. 81.
Robertson v. Cease, 97 U. S. 646.
Continental Ins. Co. v. Rhoads, 119 U. S. 237.

(2.) In petitions for removal on the ground of local prejudice.

Hall v. Chattanooga Ag. Works, 48 Fed. Rep. 599.

(*b.*) The Federal Circuit Courts cannot permit amendments to a petition for removal filed in a State Court, by inserting jurisdictional facts, except only where the petition sets out conclusions of law instead of the facts

Crehore v. O. & M. Ry. Co., 131 U. S. 240.
Jackson v. Allen, 132 U. S. 27.
Cameron v. Hodges, 127 U. S. 322.
Carson v. Dunham, 121 U. S. 421.

(*c.*) It is proper for the State Court to permit an amendment of the petition for removal.

Ayers v. Watson, 113 U. S. 594.
Overman Wheel Co. v. Pope Mf'g. Co., 46 Fed. Rep. 577.
Freeman v. Butler, 39 Fed. Rep. 1.

VII.

Although there was a fatal defect apparent on the record, the proceedings in the United States Circuit Court were not a nullity. The case was removed from the State Court by order of the State Court, which order was operative to the extent, for instance, of preventing the claim being barred by limitation.

Robertson v. Cease, 97 U. S. 646.

ARGUMENT.

The right of removal depends upon *facts* and not upon the mode and form of stating the facts. When the State Court in 1882 ordered the case transferred to the United States Court, the case disappeared from the docket of the State Court. Until the case was again docketed in the State Court, there was nothing before the State Court for it to act upon.

So long as the case remained in the United States Court, it was incumbent on Nichols to state his objections to the proceedings as they arose; otherwise he waived such of them as were capable of being waived. If the original petition for removal was not filed in time, the objection should have been taken promptly. Nichols never raised this objection while the case was in the United States Courts; therefore, he waived it. And having once waived the objection, he cannot now be heard upon it.

The original petition for removal was, however, filed in due season. Under the Missouri Code, Sec. 2062, R. S. of Mo. of 1889, the court can and could then extend the time for filing pleadings. The defendant Stevens procured two extensions, not, as in most of the cases cited by defendant in error, after he was in default, or after a trial, but before an answer would otherwise have been due. There was no trial, no experimenting with the court, nothing ing but an extension of time, which was allowed with the consent of the other party. Consequently, the petition was filed in due season.

Another point is that the Missouri Code required

Mirick and Stevens to answer jointly (Sec. 2051, R. S. of Mo., 1889), whereas Mirick had not been served with process, and was not within the jurisdiction of the court. Mirick appeared voluntarily, and, as to him, there can be no question that the petition for removal was seasonable. The failure to serve process on Mirick explains the extension of time for pleading for Stevens. As the petition for removal was joint and seasonable as to, Mirick, it was seasonable as to both, without regard to the extension of the time of pleading and without regard to the waiver of objections.

II.

The original petition for removal is, then, unobjectionable so far as the time of filing is concerned, whether because it was actually filed in due time, or because the condition of the case as to Mirick made the petition for removal operative as to both defendants, or because the objection was waived. The question then arises whether the original petition is capable of amendment after the first term at which a trial might have been had so as to give the United States Court jurisdiction.

The *right* of removal once existed. It was acknowledged by the State Court in making the order of removal, and by Nichols in acquiescing therein. The defect in the original proceeding was not in the *right* of removal, but in the omission to properly set out all of the facts constituting the right and in the legal presumption that the Circuit Court of the United States does not have jurisdiction until the contrary appears. The effect of the amendment was

not to originate a new right or to revive an expired one, but to effectuate the obvious intention of the State Court, which intention was defeated, not by any defect in the *order of removal*, but merely by the incapacity of the United States Circuit Court to act until certain facts should appear in a paper over which it had no control. The State Court removed the case from its own docket and the case could be and was redocketed in that court only by virtue of the order of the United States Court in passing on the jurisdiction of the United States Court. The effect of the remanding order was to nullify the proceedings in the Federal Court, but the redocketing of the case in the State Court was necessary before any proceeding could be had therein in the State Court.

On the very day on which the mandate of the Federal Court was filed and the case redocketed in the State Court, the motion was made for leave to amend the original petition for removal by inserting the diverse citizenship of the parties at the commencement of the action, and again asking for a removal of the case. This motion set out that such diverse citizenship at the commencement of the action actually existed, and its allegation was omitted from the original petition for removal by accident, as it was known to the attorney who drafted the petition and he intended to insert the same therein. These facts were verified by affidavit; and the original petition, affidavit and bond were tendered in support of the application for removal. No objection was made to any of these papers, but the motion was overruled on the ground that if an amend

ment of the petition was proper, it could not relate back to the time of filing the original petition for removal.

Under the law of Missouri, the right to amend pleadings and other proceedings is provided for by numerous statutes, mostly embraced in Article VI, of the Code of Civil Procedure, Secs. 2097 to 2117 of the Revised Statates of Missouri of 1889. Section 2117 reads as follows:

"It shall be the duty of the courts to so construe "the provisions of law relating to pleading, and to "so adapt the practice thereunder as to discourage, "as far as possible, negligence and deceit, to pre- "vent delay, to secure parties from being mislead, "to place the party not in fault as nearly as possible "in the same condition he would be in if no mistake "had been made, to distinguish between form and "substance, and *to afford known, fixed and certain "requisitions in place of the discretion of the court or "judge thereof.*"

It is thus seen that if it was proper or legal to amend the original petition for renoval, no discretion was left in the State Court to refuse leave to make such amendment. In other words, the petitioner had a "known, fixed and certain" *right* to amend instead of being dependent on the indulgence of the State Court. That a petition for removal is amendable in the State Court is established by the decisions: Ayers v. Watson, 113 U. S. 594; Overman Wheel Co. v. Pope Mfg. Co., 46 Fed. Rep. 577; Freeman v. Butler, 39 Fed. Rep. 1. The State Court erred, therefore, in exercising its discretion by refusing leave to amend the petition for removal.

III.

The next question is whether an amendment to a petition for removal made on the day a removed case is redocketed in the State Court after being remanded from the Federal Court relates back to the date of the removal; or whether the intervening terms of the State Court, held while the removed case was off of the docket of the State Court and pending in the Federal Court, are to be considered. If the State Court had originally refused to remove the case, and had continued to assert jurisdiction over it, the question would be different. In the present case, the circumstances are very similar to those in the cases cited under Point IV of this brief. The application was made as promptly as possible after the remand to the State Court, and before any proceeding whatever had been had therein. The order of remand, the stipulation reciting the proceeding in the Federal Courts, the affidavits verifying the facts, particularly as to diverse citizenship at the commencement of the action and accidental omission of the allegation thereof in the original petition, which allegation the draftsman intended to insert, and the original petition, bond and affidavit, were all read in support of the motion in the State Court on the day the case was redocketed.

This day was the first time since the original removal of the case, at which an application to amend was necessary. The intervening time should no more be counted than it was in the cases pending in State Appellate Courts at the time of passing the

Act of 1875, and subsequently remanded for new trial.

The original order of removal was not absolutely void. It was erroneous merely. It was operative to the extent of divesting the State Court of jurisdiction, but it was inoperative so far as conferring plenary jurisdiction on the Federal Court was concerned. The case was *pending* in the Federal Court and not in the State Court. The Federal Court had jurisdiction to make a valid remanding order, but it was incapable of rendering a valid judgment on the merits.

As the proceedings in the Federal Court were not an absolute nullity, and the State Court had divested itself of jurisdiction, the time during which the case was pending in the Federal Court should be disregarded in determining whether the amendment was seasonable.

IV.

Defendant in error moves the court to dismiss the writ of error for the reason that it was manifestly sued out for delay only. This requires a short statement of the case. The judgment which is the basis of the action against the present plaintiff in error was a judgment by default recovered against the Texas and Atlantic Refrigerator Car Co. upon two notes made payable to J. R. Barrett and signed by said corporation "by J. R. Barrett, President."

The notes were discounted at the Commercial Bank of St. Louis and were paid by Barrett when overdue. By agreement made after said notes had matured, with Nichols, the defendant in error, Bar-

rett paid the money to Nichols instead of the Commercial Bank, of which Nichols was cashier, with the understanding that Nichols was to sue the corporation and pay Barrett the proceeds of the suit. In accordance with this scheme, Nichols instituted suit against the corporation and service of process was had upon Barrett, as president thereof, Barrett being the same person for whose benefit the suit was brought. None of the other officers of the corporation knew of said suit and the judgment was procured by default.

This is the judgment upon which it is sought to hold plaintiff in error upon his agreement to subscribe to the capital stock of said corporation. Prior to the incorporation of the corporation the scheme of the enterprise was altered so as to require a very much larger capital to carry on its business; and Stevens immediately gave notice that he would only take twenty shares on the new basis in place of his original subscription for fifty shares. In this Barrett acquiesced, and when the corporation was organized Stevens was issued a certificate for twenty shares. All this transpired prior to the making of the notes and before incorporation. There is no proof of consideration for the notes or that Barrett had paid up his own stock subscription.

On these facts, plaintiff in error claimed to be released from his original subscription of fifty shares and to be liable only for twenty shares; that Barrett, being the only person in interest, could not by using the name of Nichols procure a valid judgment by default against the corporation by serving process upon himself as president; that such a judg-

ment would not estop the stobkholders from showing the total want of consideration for the original notes, and that these facts were sufficient to render the judgment null and void.

The State Court proceeded on the ground that a judgment against a corporation is binding on the stockholders, and that one who before incorporation had agreed to subscribe for stock could not be released from the agreement. The narrow ground taken by the State Court appears by its refusing the following instructions asked by plaintiff in error:

"The Texas & Atlantic Refrigerator Car Company was not organized as a legal corporation until the articles of association were filed in the office of the Secretary of State, to-wit, on the 29th day of September, 1874, and a certificate of incorporation issued by him to said company. If the court believe from the evidence that after the defendant Stevens had signed the original subscription paper for fifty shares of stock in the Texas & Atlantic Refrigerator Car Co., and before the certificate of incorporation of said company was granted, the scheme of said company was changed in a material respect, without his consent; that after such change he notified the company, through its president, J. R. Barrett, that he would only take twenty shares of stock therein; that after said notice the company made a call of 50 per cent. on said twenty shares of stock on said Stevens and he paid said call; that after that said company treated and acquiesced in said payment as a full payment of fifty per cent. on the stock taken by the defendant Stevens in said company, then said company became estopped from

claiming on said original subscription and the plaintiff is likewise estopped from claiming on said original subscription, and said Stevens is only liable for 50 per cent. on twenty shares of said capital stock, and it will so find, provided it finds for plaintiff.

"If the court believe from the evidence that the plaintiff is prosecuting this suit for the use and benefit of J. R. Barrett, the president of the Texas & Atlantic Refrigerator Car Co.; that said Barrett, as president of said company, acquiesced in the defendant Stevens reducing his original subscription from fifty to twenty shares of stock in said company; that said reduction took place before the notes were made upon which judgment by default read in evidence was rendered, then the plaintiff cannot hold defendant Stevens for more than the unpaid balance on said twenty shares, and it will so find, provided it finds a verdict for plaintiff.

"If the court believe from the evidence that J. R. Barrett was president of the Texas & Atlantic Refrigerator Car Company at the time of the making of the notes described in plaintiff's petition; that he made them in the name of said company to himself, and he and Joel Ellis endorsed them in blank, and said Barrett had them discounted at the Commercial Bank of St. Louis; that said Barrett afterwards paid off said notes to said bank; that he and the plaintiff agreed at the time that the plaintiff should give his note for $10,000 to said Barrett, and plaintiff should sue the Texas & Atlantic Refrigerator Car Company on the notes paid off by said Barrett to said bank, for the use and benefit of said Barrett; that said Barrett was at said time the

president of the Texas & Atlantic Refrigerator Car Company, and so continued as such president until the institution of this suit; that in pursuance of said agreement the plaintiff did institute suit on said notes on the 11th day of December, 1875, in the Circuit Court of Pettis County, Missouri, against the Texas & Atlantic Refrigerator Car Company, and the summons in said case was served on J. R. Barrett as president of the Texas & Atlantic Refrigerator Car Company, and there was no appearance by said Texas & Atlantic Refrigerator Car Company to said suit, but judgment was rendered against it by default for the amount of principal and interest of said notes, then said Circuit Court of Pettis County, Missouri, had no jurisdiction over the Texas & Atlantic Refrigerator Car Company and said judgment by default was and is null and void, and it must find for the defendant.

All of which is respectfully submitted,

GEO. A. MADILL,
JOHN M. HOLMES, and
JAMES A. CARR,
Attorneys for Plaintiff in Error.

157-370

157-370

Office Supreme Court, U. S.
FILED.
MAR 18 1895
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

NO. 789.

JAMES A. CARR, Administrator of ROBERT S. STEVENS, deceased, - Plaintiff in Error.

vs.

WILLIAM NICHOLS, - - - Defendant in Error.

ERROR TO SUPREME COURT OF MISSOURI.

REPLY OF DEFENDANT IN ERROR TO THE BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR ON THE MOTION TO DISMISS OR AFFIRM.

GEO. P. B. JACKSON,
For Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

NO. 789.

JAMES A. CARR, Administrator of ROBERT S. STEVENS, deceased, - Plaintiff in Error.

vs.

WILLIAM NICHOLS, - - - Defendant in Error.

ERROR TO SUPREME COURT OF MISSOURI.

REPLY OF DEFENDANT IN ERROR TO THE BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR ON THE MOTION TO DISMISS OR AFFIRM.

It is proper to add something in answer to what has been suggested by the attorneys for the plaintiff in error in their brief and argument. All that they have submitted proceeds upon an assumption which is contrary to the law as decided

in this case when it was in this court before. (Stevens vs. Nichols 130 U. S., 230.) The plaintiff in error starts with the proposition that the jurisdiction of the cause had been transferred from the State to the Federal court, and upon that he builds two arguments; one to establish that he offered to amend as soon as possible in the State court, and the other to establish the fact that time was not fleeting in the State court; that as the jurisdiction, as he contends, had been transferred to the Federal court, therefore there was no lapsing of time or terms in the State court, and when the record was filed there in May, 1890, everything was in the same condition as it had been when the defective petition for removal was filed in that court in May, 1882; in other words while eight years had passed in the federal tribunal and whilst every one connected with the case had become eight years older, yet in the State court, for the purposes of this case, 1890 was the same as 1882. The decision of this court, however, on the former occasion was that the Federal courts never acquired jurisdiction of the cause, and that they had power to do but one thing and that was to remand the case. Of course the jurisdiction was somewhere, and if it had not been transferred to and vested in the Federal court, necessarily it remained in the State court. Neither the decision of this court nor the order of the United States Circuit Court remanding the case conferred any jurisdiction upon the State court. The effect of these judgments and orders was simply to determine that the Federal courts had not acquired jurisdiction. The foundation therefore of the argument of the plaintiff in error fails. The case was in a condition where he could at any time have procured any proper order in the State court, and, at the least, either party would have been entitled to an order of the Federal court remanding the case. From this it seems fair to conclude that the amendment, if it had been permissible, was not

made as soon as it could have been, and that the lapse of time after which the petition for removal could have been filed was constantly increasing Certainly after this court had decided the case, as reported in the 130th volume of the reports, which occurred in April 1889, the plaintiff in error could have taken some steps in the direction of amending his petition for removal, if he had the right to do so, but, instead, he allowed a whole year to elapse before he did anything. If it had been necessary to have the order from the Federal court remanding the case, the plaintiff in error should have been deligent in procuring it. That, however, was not essential to a redocketing of the case in the State court, and the proceeding has the appearance that the plaintiff in error was courting delays all the way through, and only acted when forced to do so, and then in a dilatory manner.

The plaintiff in error urges that the time in which a petition for removal may be filed is not jurisdictional, and therefore may be waived. We concede this, but we submit that if the matter of time had been waived it could not cure the defect in failing to allege the diverse citizenship at the commencement of the suit. That was jurisdictional, and was such a defect as absolutely avoided the whole proceeding, as this court has already decided in this case. Therefore there were no such conditions existing as that the conduct of either party might operate as a waiver of anything. When the plaintiff in error did appear in the State court, and for the first time; viz: in May, 1890, proposed to present a petition containing the essential jurisdictional allegations, the objection on account of the time at which it was done was made. There certainly was no waiver of objection to the matter of time, either when a proper petition was presented or afterwards.

The plaintiff in error resorts to another means of avoiding the effect of his delay, and that is by attempting to fasten his

right of removal to that of one Mirick, a party to the original proceeding, and by claiming that if Mirick was in time, then Stevens must have been. This argument concedes that if the plaintiff in error could have proceeded alone, the time in which to make the application for removal on his part had expired before he filed his petition jointly with Mirick. This position is based upon the statement found at the bottom of page 10 of the argument of the plaintiff in error, in which it is said that "the Missouri code required Mirick and Stevens to answer jointly." And then it is claimed that because Mirick had not been served with process, therefore Stevens could not answer, hence the time for removal had not expired. It is shown, however, from the "Agreed Statement," which takes the place of the record on this hearing, that without waiting for Mirick to be brought in, Stevens had appeared and obtained leave to answer in September, 1881, and then again in January, 1882, had actually pleaded, by filing a demurrer, and, later on in the same term, he withdrew the demurrer and again obtained leave to file an answer, and on the same day Mirick entered his appearance, and obtained separate leave to file an answer after the term, and thereafter, in vacation, on April 21st, 1882, they did file an answer and afterwards on May 4th, 1882, they filed their petition for removal. (Agreed statement page 3.) There thus seems to be but little substance in this contention on the part of the plaintiff in error. But there is still another vice in this argument, and that is that the plaintiff in error is endeavoring to settle his rights in 1881 and 1882, when the Act of 1875 was in force, according to the provisions of the amended law which was not enacted until some years later.

The section of the state statute, however, is not as the plaintiff in error seems to understand. It is not quoted by him, but it reads as follows:

"Sec. 2051. Two or more defendants making the *same defense* shall answer jointly." Thus it will be seen that the only joint answer required by the Missouri code is one in which several defendants make the *same defense*. The plaintiff in error has insisted upon the insertion of the answer in the agreed statement. The first answer was simply a general denial, and whether we turn to the original or the amended answer we see that there were two distinct defenses. The allegations in the petition or motion for judgment and execution against Stevens and Mirick as stockholders, and in which several stockholders might be united under the state practice, amounted to the averment of two contracts, viz: the one with Stevens for a certain amount and the other with Mirick for another amount. Stevens' defense was, in the first place, that he had not made that contract, and in the next place, that he had been released from it. Mirick set up a similar defense as against the contract averred to have been made with him. Neither one of these defenses depended upon the other. The proof of one didn't prove the other, and they were as separate and distinct as the contracts which they were severally charged with having made. There was no such connection between these parties as required a joint answer, or required that Stevens should wait until Mirick was brought in by process. The verdicts and judgments in the Federeal court were separate, so much so that Stevens had no difficulty in separating himself at that time from his associate Mirick, and bringing the case here upon writ of error, and in having it adjudged by this court, that, without any regard to Mr. Mirick's attitude in the case, the Federal courts had never acquired jurisdiction as to him, Stevens. It seems rather late at this date for the plaintiff in error to attempt to ally himself with Mr. Mirick in order to avoid the effect of his delay in the earlier stages of the litigation. So separate and distinct are the pro-

ceedings against different stockholders that the proceeding against each one is regarded as a suit which may be removed to the Federal court, although it originates by filing a motion in a case between the creditor and the corporation. At one time Judge Dillon held in the case of Webber vs. Humphreys, 5 Dill., 223, that this proceeding was so connected with the main case that it was not removable, but later on, in view of certain decisions of the Supreme Court of Missouri and of this court, that case was overruled in the case of Lackawanna Coal and Iron Company vs. Bates, 56 Fed., 737.

The plaintiff in error also contends that as often and as long as the time for answering is extended, so the time for removal is extended. There are doubtless cases which tend to support this contention, and the strongest one is probably that of Wilcox & Gibbs vs. Phœnix Insurance Co., 60 Fed. 929. It will be observed, however, in reading that case that it depends upon the code of practice in the state of South Carolina. The case of Spangler vs. R. R. Co., 42 Fed. 305, is directly opposed to the result of the South Carolina case and is distinguished in the latter case. The Spangler case is from the Western District of Missouri and is a decision based upon the practice act of that state, where it is settled that a mere granting of leave to file an answer at a later day is not a rule of court, and under that decision such a result as is claimed from extending the time to answer could not arise under the Missouri practice act.

It should be noted however that in the opinion in the South Carolina case (60 Fed. 932.) emphasis is placed upon the difference between the law of 1875 and that of 1888. The South Carolina case was a decision upon the right of removal as it exists under the present law, which the court says would be altogether different in a case arising under the law of 1875.

Since the plaintiff in error, or rather his ancestor, attempted to remove the cause in the first instance in 1882, when the law of 1875 was in force, there is all the more reason to be controlled by the Spangler case which is a construction of the effect of the law of 1875, as well as of the Missouri practice act. The South Carolina case is made to depend also upon the decision of this court in the case of K. C. F. S. & M. R. R. Co. vs. Daughtry 138 U. S. 296, which like the case at bar was on motion to dismiss or affirm. A reading of it however does not disclose that it is any support for the decision to which it is cited in the South Carolina case. A different conclusion seems to have been reached, and the motion to affirm was sustained.

But even if the plaintiff in error had been in time with his original petition and if he had made a timely application to amend it, it is still necessary for him to establish the other proposition—that he had the right to amend. He has not added any authority that is in point, in addition to the one which we referred to in our original brief, viz: Freeman vs. Butler 39 Fed. 1. The other cases named, Ayers vs. Watson 113 U S. 594, and Overman, Wheel & Co., vs. Pope Mfg. Co., 46 Fed. 577, do not at all meet the question. As shown in our brief there are several cases holding directly to the contrary of Freeman vs. Butler. The subject is fully discussed in the most recent case of Brigham vs. The Lumber Co. 55 Fed. 881, where the case of Freeman vs. Butler is expressly disapproved. In that case there were delays somewhat similar to those in the case at bar, and the following language, which we quote from that case, is pertinent here:

> The answer, in theory, to such a doctrine is that there is nothing in substance to be related back to. The petition not alleging the necessary jurisdictional facts, it is a nullity, and the

doctrine of relation has no application. There is, of course, no objection on principle to the amendment of a petition. There is no objection to the filing of a second petition, provided it is done within the time prescribed by congress. But when the time goes by the right is lost. To allow an amendment to the petition after that is the same as allowing a new petition, and either is a clear violation of the law. One purpose of the law was a severe restriction in respect to the time. The object was to require the party to change the forum at once, before waiting to experiment in the state court, either to contest the tribunal, or for mere purposes of delay. In this case six months had elapsed since the time to answer had expired. Other proceedings had been had in the state court after the case was remanded. Since the statutory time for removal had elapsed, there have been two terms of the state court in that county when the cause may have been tried, and it now stands noticed for trial there during the present month. The pleadings have been amended in the state court, and the time for answering an amended complaint had expired before the second petition for removal was filed. Depositions, it seems, were also taken. If the cause can be removed upon the discretion of the state court by allowing an amendment to an original and insufficient petition there can be no limit, so far as time goes, and the removal can be allowed at any time.

Another purpose of the statute was to secure certainty. It was never contemplated that a case should be dangling for so long a time in midair between the two courts, neither party nor the court knowing whether it might or might not be removed. The rule of the statute is certain, and easy to be complied with. This question in regard to the necessity of setting up the jurisdictional facts has been well settled by a long course of federal decisions, and there is no longer any possible excuse for practitioners not complying with it.

The motion to remand the case to the state court is granted.

The significance of the fourth sub-division of the argument for the plaintiff in error, beginning at page 15, is not appreciated by us. We cannot imagine that counsel upon the other side could have supposed that the conclusion of this court could be affected by what they have seen fit to print on pages 15 to 19 of their brief and argument. It certainly has no connection with and can have no influence upon the questions involved in this case as it now stands. The "short statement of the case," which the learned counsel say is required because we

grounded our motion upon the very language of the rule of this court, does not appear to be authorized by anything that is now before the court. To save the cost and the trouble of printing a long record, an agreed statement and stipulation were prepared, signed and filed. That agreed statement commences as follows: "To avoid the necessity of printing the entire record and to save the court the unnecessary labor and annoyance of reading many pages of immaterial matter, counsel for both parties have selected and set forth all that is necessary to the determination of the motion to dismiss or affirm, and by stipulation hereto attached have agreed that in lieu of the entire record the motion shall be heard and determined upon the following statement." The substance of this statement is repeated in the stipulation which is attached to the agreed statement. See Agreed Statement pages 1 and 25. The only place in which can be found a semblance of a foundation for the plaintiff in error's "short statement of the case" is in the answer which he caused to be set forth in the agreed statement, but from that agreed statement it appears that the allegations of that answer were denied, and it farther appears that upon every investigation and trial which has been had, whether in the Federal or the State court, whether before a jury or the Judge, the finding has invariably been against the truth of this "short statement of the case." As we understand, however, all such matter is foreign to any investigation that this court can make, whether it is upon this motion to affirm or whether it would be upon a hearing on the merits. The case being here upon a writ of error to the Supreme Court of Missouri, upon the theory that a federal question was involved and improperly decided, all that can be inquired into is whether or not there was a federal question in the case, and whether or not it was improperly decided, if there was. With this understanding

of the case it seems to be wholly unnecessary to weary or annoy the court with allusions to these extraneous matters, and we therefore dismiss what we regard as an unauthorized suggestion, with what we have just said, and submit the motion to dismiss the writ of error or affirm the judgment, with what we have said concerning the right of removal to the federal court in the original brief and argument and in the present one. If the court agrees with us that the petition for removal was not filed in time, or if the right to amend, contended for by the plaintiff in error, did not exist as claimed by him, then the result must be that this court will either dismiss the writ of error or affirm the judgment of the Supreme Court of Missouri.

Respectfully submitted,

GEO. P. B. JACKSON,

For the defendant in error.